BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LUZ RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	
GOODWILL INDUSTRIES	)	Docket No. 1,069,518
Respondent	)	
AND	)	
	)	
ACCIDENT FUND GENERAL INSURANCE	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the August 15, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Gary K. Albin of Wichita, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 19, 2014, preliminary hearing and exhibits thereto; the transcript of claimant's May 29, 2014, discovery deposition; the transcript of the June 25, 2014, deposition of David Chadick; the transcript of the June 25, 2014, deposition of Rigo Zelaya; and all pleadings contained in the administrative file.

ISSUES

Claimant's Application for Hearing indicated her repetitive work activities including loading rolls of fabric to a cutting machine resulted in injuries to her back, right upper extremity and all affected body parts. The date of injury was listed as each and every working day including February 13, 2013. At the preliminary hearing, claimant requested medical treatment, payment of Dr. Pedro A. Murati's bill as unauthorized medical and payment of claimant's prescriptions as authorized medical expenses.

The ALJ's Order consists of the following:

> After reviewing the preliminary hearing testimony of the claimant, the discovery deposition of the claimant, the evidentiary deposition of David Chadick, and the evidentiary deposition of Rigo Zelaya, the court preliminarily finds that the claimant met with personal injury, arising out of and in the course of her employment, that she provided notice of that injury, and that her injury is the prevailing factor in the claimant's need for treatment.
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> Respondent is ordered to provide a list of two physicians from which claimant is to choose an authorized treating physician. Respondent is ordered to reimburse claimant's counsel for the unauthorized treatment of Dr. Murati.

Respondent argues claimant failed to give timely notice. Respondent submits claimant's date of injury was in February 2013, but asserts claimant did not provide notice of her injury until April 11, 2014. Respondent contends claimant did not sustain an injury by repetitive trauma arising out of and in the course of her employment, as she did not perform the job task of lifting bolts of fabric she alleges caused her injuries. Finally, respondent asserts that since claimant did not perform the job task of lifting bolts of fabric, her work activities were not the prevailing factor causing her injuries and need for medical treatment.

Claimant asks the Board to affirm the preliminary hearing Order.

The issues on appeal are:

1. Did claimant provide timely notice?

2. Did claimant sustain personal injury by repetitive trauma arising out of and in the course of her employment with respondent? Specifically, were claimant's alleged repetitive work activities the prevailing factor causing her injuries and need for medical treatment?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the undersigned Board Member finds:

Claimant is a native of Honduras and required an interpreter at her deposition and the preliminary hearing. Her formal education ended at the completion of the third grade. At her deposition, claimant testified she worked for respondent for three years. She indicated that until April 2013, she had been lifting large bolts of fabric used to make hospital, jail or firefighter uniforms. She lifted the bolts of fabric to put them in a machine and stood on her toes because the machine was taller than her. Claimant estimated the bolts of fabric weighed more than 50 pounds. Once the fabric was prepped, she would sew the uniforms.

Claimant indicated that in October 2012, she started having pain from her neck below her right ear, in the back of her shoulder and down her right arm to the hand. Claimant, at her deposition, testified she would tell her supervisor, Don Rigo,[1] her right shoulder was hurting. According to claimant, Rigo (Mr. Zelaya) indicated to claimant he would tell his supervisor, David Chadick. Claimant indicated she did not know whether that happened.

According to claimant, in February 2013, she saw Dr. Osio for her right shoulder. The doctor took x-rays, told claimant she had a right shoulder injury and gave her a note with work restrictions. Claimant indicated that two days later, she took the note to respondent and gave it to Mr. Zelaya. At the preliminary hearing, claimant testified that when she gave Mr. Zelaya the note with the restrictions, he got mad.

Claimant testified she kept telling Mr. Zelaya her right arm was hurting. Claimant testified that as a result, in April 2013, Mr. Zelaya limited her duties to only sewing. She indicated she kept reminding Mr. Zelaya of the shoulder injury and he said he would tell Mr. Chadick. Claimant testified she continued working and her pain worsened.

Claimant testified that in March 2014, she was moved to ironing. She started having back pain and her arm became worse. Claimant indicated she again told Mr. Zelaya her arm was going numb. Mr. Zelaya told claimant to tell her other supervisor, who was Andrew. Claimant indicated she spoke to Andrew, who talked to Mr. Chadick. In April 2014, claimant was moved from ironing to filling bags and was sent by respondent to see a doctor. Claimant indicated she was given a prescription for medications, but had to pay for the medications herself.

At the request of her counsel, claimant was evaluated by Dr. Murati on May 27, 2014. Dr. Murati reviewed no medical records, but took a history from claimant and physically examined her. The doctor noted he previously evaluated claimant in 2004 for a 1999 work-related injury. At that time, he diagnosed claimant with low back pain secondary to lumbosacral strain with radiculopathy, right wrist pain status post anterior transposition of the right ulnar nerve at the elbow and a carpal tunnel release and right knee pain secondary to patellofemoral syndrome. The history claimant gave to Dr. Murati indicated that after starting her employment in 2011, she developed pain in the right shoulder. The history indicated there were long rolls of fabric claimant lifted and placed over her head into a machine. Dr. Murati recorded claimant reported right shoulder pain to her supervisor, but did not file a workers compensation claim at that time.

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[1] At her deposition, claimant referred to her supervisor as Don Rigo and indicated he was called Rigoberto. At the preliminary hearing, claimant used the name Rigoberto Celaya and Mr. Rigo. Witness David Chadick refers to claimant's supervisor as Rigo. Rigo Zelaya, whose full first name is Rigoberto, testified he was claimant's supervisor. Rigo, Don Rigo, Mr. Rigo, Rigoberto and Rigoberto Celaya are, in fact, Rigo Zelaya.

Dr. Murati's impressions were right recurrent carpal tunnel syndrome status post pre-existing release, left carpal tunnel syndrome, bilateral rotator cuff sprains versus tears with probable labral involvement and myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals. The doctor opined:

> She does admit to having right carpal tunnel release in the past, upon review of my previous report she had surgery on her ulnar nerve as well. The claimant states after healing from surgery she was able to work without difficulty. . . . The only way that the recurrent carpal tunnel syndrome could come about is through new and distinct structural anatomical change to the Median nerve which was not present before this last series of repetitive traumas. . . . Apparently, on this claimant's date of injury she sustained enough permanent structural change in the anatomy of her wrists, shoulders, neck and upper back which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the multiple repetitive traumas at work.[2]

Mr. Chadick, respondent's vice president of industrial services, testified he is responsible for contract work, which means providing labor to do the work for other businesses. An outside company will provide respondent with raw materials and respondent's workers transform the raw materials into a product for the outside company. He explained respondent provides employment opportunities for disabled persons and people with other barriers to the traditional workforce.

Mr. Chadick testified he supervised Mr. Zelaya, claimant's supervisor. Mr. Chadick indicated claimant historically worked in respondent's sewing department on a contract, but was also required to work on other contracts, performing other tasks. According to Mr. Chadick, in March 2014, claimant and another worker were moved to a job working with pieces of insulation for Beechcraft. Mr. Chadick indicated that while working on the Beechcraft contract, claimant complained of itching. He testified Mr. Zelaya offered to let claimant wear an apron, sleeves and gloves while working on the Beechcraft job, but she refused. Claimant was then moved to an easier position placing labels on materials.

On Friday, April 11, 2014, Mr. Chadick was told by Mr. Zelaya of a conversation he had with claimant. According to Mr. Chadick, Mr. Zelaya indicated he was approached by claimant and asked if he remembered when claimant hurt her shoulder two years earlier. Mr. Zelaya indicated he did not remember claimant reporting a shoulder injury.

Because of his conversation with Mr. Zelaya, Mr. Chadick asked claimant if she had any shoulder issues and she indicated she did. Mr. Chadick asked claimant if she wanted to see a doctor and she said no. Mr. Chadick told claimant to take the rest of the day off and come back Monday. When claimant returned on Monday, she felt her shoulder was

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[2] P.H. Trans., Cl. Ex. 1 at 4-5.

an issue. That was the first time Mr. Chadick learned claimant was alleging a work injury. Claimant reported the mechanism of injury was lifting bolts of fabric. When Mr. Chadick indicated he would check into it, claimant recanted and said it was pulling fabric from the bolt across the table where she worked that caused her right shoulder injury.

Claimant was sent to Via Christi Occupational and Environmental Medicine and was given restrictions. Claimant was moved to fiber work, which was light work and not repetitive. According to Mr. Chadick, prior to April 11, 2014, he had never received a report of a shoulder injury from claimant. However, around March 14 to 18, 2014, claimant brought in a doctor's note indicating she had a rash and headaches that might be associated with the work she was doing on the Beechcraft contract.

Mr. Chadick described what was entailed in pulling fabric across the table. The table was slightly taller than the height of a typical conference table and is designed to be worked at while standing. Mr. Chadick explained the bolt of fabric is on a pulley system and the edge of the fabric is approximately 10" above the table, which should not have resulted in a situation where claimant would have been reaching overhead with her arms.

Mr. Chadick indicated claimant's job duties never included taking bolts of fabric and placing them in a machine above her head and never performed a job requiring overhead reaching. He explained claimant, while working in the sewing department, would receive a stack of precut pieces of fabric to sew together to create safety vests or medical scrubs. Mr. Chadick explained that in the past, employees placed bolts of cloth in machines above their heads. Respondent, however, recognized the bolts were heavy and had bigger and stronger workers lift the bolts of fabric. Mr. Chadick indicated claimant is 4'11" tall and is not robust. He indicated the bolts of fabric easily weighed 200 pounds and take three men to lift. The bolts are approximately 60" wide and roughly 15" in diameter with a pole on them that has to fit into an exact spot on the machine. Mr. Chadick indicated there were smaller bolts of fabric, but putting them on a machine was not in claimant's job description. He testified he is 6' tall, weighs 205 pounds, is old and would have difficulty lifting a bolt of fabric.

After claimant was moved to the Beechcraft contract in March 2014, her job was similar to her job in the sewing department. Mr. Chadick indicated claimant would receive pieces of insulation/fabric to use with patterns and she would iron the edges of the fabric. The fabric was very lightweight. A cutter would roll out the fabric onto the table and cut it. Claimant was not required to roll out the fabric nor cut the pieces. Those tasks were performed by a cutter.

Mr. Chadick testified he was in the facility periodically where claimant worked and never observed her lifting bolts of fabric. Nor did he think she was physically capable of doing so. He indicated claimant signed an English or Spanish language description of her job duties, but was not certain which version. Claimant's written job description was not

made part of the record. Mr. Chadick testified claimant continues to work for respondent, receiving her regular wages and having available 40 hours of work each week.

Rigo Zelaya testified he was claimant's supervisor in the sewing department. On April 11, 2014, claimant came to him and complained her arm hurt. Prior to April 11, 2014, claimant never complained of a shoulder injury. Mr. Zelaya then took claimant to see Mr. Chadick. Claimant attributed the shoulder injury to laying out fabric. Mr. Zelaya indicated claimant never alleged overhead reaching caused her shoulder injury. He also indicated he took care of loading the bolts of fabric, as they weigh 100 to 200 pounds. If he needed help with a bolt, he called Mr. Chadick or Andrew, the other supervisor. According to Mr. Zelaya, the only task a sewing machine operator does is sew.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

This Board Member finds claimant's date of injury is in February 2013, when she received restrictions from Dr. Osio. That is the earliest event under K.S.A. 2012 Supp. 44-508(e) that establishes claimant's date of injury.

Claimant's credibility is the key issue in this matter. Claimant asserts she sustained repetitive injuries to her back and right upper extremity as the result of repetitively lifting large bolts of fabric and she first told her supervisor of having right shoulder pain in October 2012. Those assertions were controverted by Mr. Zelaya and Mr. Chadick. Mr. Zelaya and Mr. Chadick testified they were first told of claimant's alleged work injury on or about April 11, 2014. They testified claimant was not required to lift large bolts of fabric. Mr. Chadick testified lifting bolts of fabric was not in claimant's job description. However, claimant's job description was never produced. Mr. Chadick also testified claimant changed her story after he indicated he would check into the matter. When told this, Mr. Chadick asserts claimant indicated unrolling bolts of fabric caused her injuries.

Claimant testified twice and both times she indicated she was required to lift large bolts of fabric. Her Application for Hearing lists loading rolls of fabric to a cutting machine as the cause of her injuries. She told Dr. Murati about lifting long rolls of fabric over her

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[3] K.S.A. 2012 Supp. 44-501b(c).

[4] K.S.A. 2012 Supp. 44-508(h).

head into a machine. Claimant's testimony has been consistent regarding her mechanism of injury.

Claimant testified she told Mr. Zelaya of her right shoulder pain in 2012. In February 2013, claimant went to see Dr. Osio and took a note from him to Mr. Zelaya. The ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ found claimant proved she suffered an injury arising out of and in the course of her employment with respondent, her work activity was the prevailing factor causing her need for treatment and that she gave timely notice of her injury. That implies the ALJ found claimant's testimony credible.

The Board concludes claimant proved by a preponderance of the evidence she suffered a right shoulder injury by repetitive trauma arising out of and in the course of her employment with respondent, and her work activities were the prevailing factor causing her injuries and need for treatment. Claimant's date of injury was in February 2013 and she gave timely notice of her injury when she took the note from Dr. Osio to Mr. Zelaya two days later.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member affirms the August 15, 2014, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of October, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[5] K.S.A. 2013 Supp. 44-534a.

[6] K.S.A. 2013 Supp. 44-555c(j).

c: Gary K. Albin, Attorney for Claimant
galbin@kbafirm.com; trod@kbafirm.com; kwilliams@kbafirm.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
kdonley@McDonaldTinker.com; pschweninger@mcdonaldtinker.com; cwise@mcdonaldtinker.com

Honorable Thomas Klein, Administrative Law Judge